Dynair Services, Inc. *and* International Longshoremen's and Warehousemen's Union, Local 19, Petitioner. Case 19–RC–12810

June 27, 1994

ORDER

BY MEMBERS STEPHENS, DEVANEY, AND BROWNING

The petition in the above proceeding was filed on January 24, 1994, by International Longshoremen's and Warehousemen's Union, Local 19 seeking a unit of all employees of the Employer employed at the Port of Seattle excluding, inter alia, guards, professional employees, and supervisors as defined in the Act. Pursuant to a Stipulated Election Agreement executed by the parties and approved by the Regional Director for Region 19 on February 18, 1994, an election by secret ballot was scheduled for March 24, 1994.

On March 1, 1994, the Employer filed with the Regional Director a motion to dismiss petition and interim motion to vacate election and hold petition in abeyance and, on March 7, 1994, a motion to withdraw from the Stipulated Election Agreement. Both motions are based on the Employer's discovery that the Petitioner also represents ''access controllers'' who are employed directly by the Port of Seattle. The Employer argued before the Regional Director that the access controllers are guards under the Act and that Section 9(b)(3)[1] of the Act requires that the petition be dismissed because ''[t]his statutory proscription was designed to prevent any union from representing guard employees on the one hand and non-guard employees on the other.''

In its response to the Employer's motions, the Petitioner, citing *Ojai Valley Community Hospital*, 254 NLRB 1354 (1981), argued that Section 9(b)(3) has no application here because the access controllers are public employees and thus not guards under the Act. The Petitioner further argued that even if the access controllers were guards, Section 9(b)(3) would still not be applicable because it is a limitation only on the Board's authority to certify a union as the representative of guards, whereas here the Petitioner is seeking certification as a representative of nonguards.

By order dated March 9, 1994, the Regional Director for Region 19, noting that Section 9(b)(3) is not applicable because the Petitioner is not seeking a unit of guards, issued an order denying motion to dismiss election petition and interim petition to vacate election and hold petition in abeyance and motion to withdraw from Stipulated Election Agreement.

On March 10, 1994, the Employer filed a request for review (appeal) of the Regional Director's ruling.[2] In its appeal, the Employer argues that the Regional Director's position ''is clearly inconsistent with the legislative purpose of Section 9(b)(3) because it sanctions the precise conflict of loyalty the statute was designed to protect.'' With regard to the Petitioner's argument that under *Ojai Valley* the controllers are public employees not subject to the Act, and therefore Section 9(b)(3) is inapplicable, the Employer contends that the instant case is factually distinguishable. Unlike the situation in *Ojai Valley*, the Employer claims that here there exists a conflict of loyalty resulting from the access controllers' responsibilities to protect the Employer's property in the event of a strike and to monitor picketing activities of the Employer's employees. The Employer further asserts that ''there is no controlling case law sanctioning the certification of a guard union as representative of nonguard employees.''

In its opposition, the Petitioner renews its arguments that because the access controllers are public employees, they cannot be found to be guards. Further, the Petitioner contends that because the access controllers are public employees, they ''do not have the right to strike or take any concerted action'' and that ''there is no potential conflict of loyalty in this case.'' Finally, the Petitioner argues that Section 9(b)(3) is inapplicable to the instant case because the unit it sought in the instant petition is for nonguards.

Having duly considered the matter, the Board finds that the Employer's request for review is lacking in merit. Even assuming arguendo that the access controllers the Petitioner represents are guards as the Employer contends, the Board has long held that ''the Act does not prohibit the Board from certifying a labor organization which itself represents guards as the representative of employees other than guards.'' *Pinkerton's National Detective Agency*, 90 NLRB 532, 533 (1950), citing *E. R. Squibb & Sons*, 77 NLRB 84 (1948). Thus, we find, contrary to the Employer's assertion, that its appeal does not present a novel issue but rather is clearly controlled by the *Pinkerton's* precedent.

We also deny the Employer's appeal for the following independent reason. The Employer does not dispute the Petitioner's assertion that the access controllers are public employees because they are employed by the Port of Seattle. *Ojai Valley*, supra, holds that public employees are not guards within the meaning of

[1] Sec. 9(b)(3) states in pertinent part that ''no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.''

[2] By an unpublished Order dated March 22, 1994, the Board denied the Employer's appeal of the Regional Director's ruling and denied the Employer's request for a stay of the election. The parties were advised that a fully articulated decision would follow.

the Act.[3] Therefore, the access controllers the Petitioner represents are not statutory guards and Section 9(b)(3) has no application here for that additional reason.

With regard to the Employer's motion to withdraw from the Stipulated Election Agreement, it is well established that the Board will allow a party to withdraw from an Election Agreement only on a showing of unusual circumstances or by agreement of all the parties. *Sunnyvale Medical Clinic*, 241 NLRB 1156, 1157 (1979). The Employer has not made a showing of any unusal circumstances which would justify withdrawal in this case. Accordingly,

IT IS ORDERED that the Employer's appeal of the Regional Director's denial of Employer's motion to dismiss election petition, motion to reopen the record and hold a hearing to take new evidence, and motion to withdraw from Stipulated Election Agreement are denied.

IT IS FURTHER ORDERED that the request for a stay of the election is denied and the proceeding is remanded to the Regional Director for Region 19 for further appropriate action.

[3] Because *Ojai Valley* held as a matter of law that public employees are not guards within the meaning of the NLRA, the Employer's attempt to distinguish *Ojai Valley* on factual grounds is wholly without merit.